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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DR. LEE ROY BLACK,
Director of the Missouri Department of Corrections and Human Resources,
DICK D. MOORE,
Chairman, Missouri Board of Probation and Parole,
Petitioners,

v.

NICHOLAS J. ROMANO,
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit has rendered a decision in conflict with this Court's decision in Bearden v. Georgia, ____ U.S. ____, 103 S.Ct. 2064 (1983).

2. Whether the opinion by the United States Court of Appeals for the Eight Circuit is erroneous to the extent that it creates an important question of federal law which should be settled by this Court.

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Ford v. Wainwright, 439 F.2d 981 (5th Cir. 1977), cert. denied, 434 U.S. 926, 98 S.Ct. 407, 54 L.Ed.2d 284;

Fritchie v. McCarthy, 666 F.2d 208 (9th Cir. 1980);

Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973);

Green v. Nelson, 442 F.Supp. 1047 (D. C. Conn. 1977);

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Romano v. Black, 735 F.2d 319 (8th Cir. 1984);

United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983);

United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978);

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522 F.Supp. 443 (D.C. Mo. 1981);

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OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Missouri, granting respondent's petition for a writ of habeas corpus is reported as Romano v. Black, 567 F.Supp.

882 E.D. Mo. 1983. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, affirming the decision of the District Court appears at 735 F.2d 319 (8th Cir. 1984).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court decision granting respondent's petition for writ of habeas corpus under Title 28 U.S.C. § 2254, was filed on May 31, 1984. Pursuant to Title 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed within 90 days of the entry of this judgment, on or before August 31, 1984. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Title 28 U.S.C. § 2454 reads in pertinent part as follows:

> "A. The Supreme Court, a justice thereof, a Circuit Judge, or a District Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> B. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears

> that the applicant has exhausted the remedies available in the courts of the State or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

STATEMENT OF THE CASE

On November 15, 1976, Nicholas J. Romano entered guilty pleas to a two count indictment charging him with the transfer and the sale of a controlled substance. On April 13, 1977, the Honorable Dean Wipple, Judge of the Circuit Court of Laclede County, Missouri, sentenced Romano (herein referred to as Respondent) to two terms of 20 years to be served concurrently.

Execution of said sentences was suspended and Respondent was placed on probation for five years. On June 15, 1977, Respondent was involved in a traffic accident which led to his being charged with the felony of leaving the scene of an accident. On July 18, 1977, Respondent's probation was revoked and he was ordered incarcerated. The charge of leaving the scene of an accident was subsequently reduced and respondent was convicted of careless and imprudent driving on October 12, 1977.

On March 28, 1980, respondent filed a pro se motion for post conviction relief in the Circuit Court of Laclede County seeking to challenge the probation revocation proceeding. Said motion was overruled as the Court held that the proper remedy was to file a habeas corpus petition. Respondent thereafter filed a

petition for writ of habeas corpus in the Circuit Court of Cole, County, Missouri, however, said petition was dismissed by the Circuit Court of Cole County on an improper procedural ground. Respondent thereafter went back to the Circuit Court of Laclede County where his motion for reconsideration of his request for post conviction relief was dismissed. Respondent filed a Notice of Appeal with the Missouri Court of Appeals, Southern District, but said appeal was dismissed.

On April 14, 1980, Respondent filed a petition for writ of error coram nobis challenging the constitutionality of his careless and imprudent driving conviction. Said petition was dismissed and respondent's out of time appeal to the Missouri Court of Appeals, Eastern District, was subsequently dismissed for failure to prosecute.

On June 12, 1981, respondent filed a petition for writ of habeas corpus with the United States District Court, Eastern District of Missouri, again challenging his conviction for careless and imprudent driving. On October 2, 1981, the Honorable John F. Nangle denied respondent's habeas corpus petition and ordered that his case be dismissed. On appeal from this dismissal respondent for the first time in federal court raised the ground that his probation revocation was improper. This being some four years after he was incarcerated. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's dismissal and, as to the new ground, dismissed said claim without prejudice for failure to exhaust available state remedies.

On October 4, 1982, respondent filed a habeas corpus petition with the Missouri Supreme Court challenging his probation revocation. On October 18, 1982, the Missouri Supreme Court denied said petition without opinion. Thereafter, respondent filed the petition for writ of habeas corpus with the United States District Court for the Eastern District of Missouri which has led to this subsequent appeal.

During the taking of respondent's guilty plea, he was interrogated by the Court in connection with his past, the incident which led to the charges and the voluntary nature of his plea. Respondent's crime concerned his possession of 26 pounds of marijuana. It appears that respondent was attempting to trade this marijuana for opium or heroin. Respondent had harvested the marijuana,

refined it and packaged it into 26 one pound plastic bags. A pre-sentence investigation was ordered. On April 13, 1977, a hearing was held on respondent's sentencing. At the sentencing hearing respondent testified and there was also testimony by a man who identified himself as the respondent's employer. Respondent's counsel also introduced a psychological evaluation which was rendered by one Sheldon Silk and an affidavit by a man named Clark. Respondent's counsel then made a statement to the Court in support of the Court's granting the respondent probation. Respondent's counsel discussed the fact that the pre-sentence investigation report did not recommend probation and also discussed the statements in the pre-sentence investigation report as well as in the evaluation by Mr. Silk, that

the respondent had trouble reconciling himself with authority figures. Respondent's counsel urged that the respondent be placed on probation. Thereafter, the Trial Judge, the Honorable Dean Whipple, indicated that he had "labored with this case" for some time and that he had decided to place the petitioner on probation. This decision was contrary to the recommendation of the pre-sentence investigation report and the recommendation of the prosecutor. On June 14, 1977, only approximately two months after the respondent was placed on probation, the incident which led to his probation revocation occurred. A hearing was held on July 18, 1977, before Judge Whipple concerning this probation violation and the respondent's probation was revoked.

At respondent's probation revocation hearing he was represented not by one but by two attorneys. At the hearing Mr. Gerald Saunders testified that at approximately 2:00 a.m. on June 14, 1977, he was standing in front of the Stein Club in Columbia, Missouri, when he saw a Datsun speeding down Broadway, serve over the center line, make a U-turn and come back by the Stein Club, serving into the parking area. At the time the car struck one Timothy Bradley. Mr. Saunders saw the car then serve to stop and Miss Jody Seificas and Terry DeHaven got out of the car. The car then pulled across the street into a parking area and when Mr. Saunders looked again it was gone. Mr. Saunders then testified that in a later conversation Terry DeHaven informed him that the respondent was driving the automobile.

Police Officer Larry Wright testified that he arrived at the scene after he received a radio dispatch and began to interview witnesses. Upon questioning Jody Seificas, she indicated that she had been riding in the vehicle involved in the accident and that the driver was respondent. Police Officer Wright also testified that upon interviewing Mr. Saunders, he was informed that Mr. Saunders saw Miss Seificas get out of the driver's side of the car but that it appeared to Mr. Saunders that she got out of the back seat of the car. There was also testimony from the mother of the victim, the father of the victim, and the victim's sister, that on the next afternoon they were visiting Timothy Bradley in his hospital room when the respondent came to the room. Mrs. Bradley stated that the respondent told

her son "It's too bad you jumped in front of me." Timothy Bradley's sister, Colleen Hibler, testified that the respondent stated "Too bad you had to jump right in front of me like that, it was a nightmare." Mr. Bradley testified that the petitioner stated "Why did you jump out in front of me?" There was similar testimony that from the time of the accident until approximately an hour after the respondent's arrest there were no calls to the police station by anyone identifying themselves as James Romano reporting an accident and in fact no one claiming to be a driver or a passenger of a car called in to report the accident.

Miss Jody Seificas when first called to testify refused to reveal any information concerning the night of the incident claiming her Fifth Amendment rights. Upon being recalled, Miss

Seificas admitted that she told a police officer on the night of the accident that she had been a passenger in the car. Thereafter, respondent called one witness to testify that he was in the hospital room with the respondent and other witnesses and that he did not hear the statements attributed to the respondent, although statements could have been made which he did not hear. The case was then extensively argued by respondent's counsel. Following a short recess, the Court informed the respondent that he was going to revoke probation.

Following respondent's probation revocation he was incarcerated in the Missouri Department of Corrections and Human Resources until December 1982, when he was granted a parole.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The basis for the District Court's jurisdiction in this cause was Title 28 U.S.C. § 2254.

ARGUMENT

The essential issue in this petition is whether this Court should allow the courts under its supervision to release state prisoners to remedy a mere procedural defect in a probation revocation hearing. Specifically, this Court should advise its lower courts as to whether a state judge hearing a request to revoke probation must expressly consider alternatives to incarceration in all cases, regardless of the seriousness of the probation violation and whether the failure to do so is so serious a violation of due process as to justify release of a state prisoner, serving a valid sentence, without giving the state Court an opportunity to remedy the procedural defect. It is the position of petitioner that the decision of the Eighth Circuit Court of Appeals in

the present cause merits review by this Court because it is directly in conflict with this Court's decision in Bearden v. Georgia, ____ U.S. ____, 103 S.Ct. 2064 (1983), it is contrary to decisions of other circuits and will work grave injury to the interest of justice not only in the State of Missouri but in all states within the Eighth Judicial Circuit.

In Bearden v. Georgia, ____ U.S. ____, 103 S.Ct. 2064 (1983), this Court considered a case wherein a prisoner's probation had been revoked due to his failure to make restitution to his victim. Admittedly, the primary issue in Bearden was whether the mere failure to make the promised restitution was sufficient to justify a revocation of probation. However, the analysis of Justice Sandra O'Connor, writing for the majority, strongly suggests that the

approach and rational of the Eighth Circuit in the present case is in conflict with Bearden.

The Eighth Circuit and the District Court in the present case have clearly overstated the need to expressly consider alternatives to incarceration. In United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983), the Court stated:

> "Whatever justification exists for requiring a trial court to explain its reasons when initially imposing sentence, there is far less justification for requiring a court to give reasons when it merely reinstates its earlier sentence after finding that the defendant had violated his probation. True, it is not inevitable that Courts

> will reimpose the original sentence upon finding a probation violation and there maybe good arguments given case for not doing so, but **when a defendant has violated the terms of his probation - even toward the end of his probationary period - it indicates to the Court that it erred in its original determination that the defendant did not need to serve his prison sentence in order to be rehabilitated."**

Id. at 839.

With these words the Third Circuit could not have more clearly stated that a violation of parole can, in and of

itself, support a revocation of probation and a subsequent incarceration, without a need for the sentencing judge to expressly consider alternatives to incarceration. In any event, Bozzano stands for the proposition that an expressed consideration of alternatives to incarceration is not absolutely mandated in every case, but is a consideration the importance of which is diminished by the nature of the probation violation and the extent of the felons culpability.

This approach was utilized by this Court in Bearden as the proper approach to probation revocation cases. Justice O'Connor, in framing the primary legal issue facing this Court in Bearden stated: "Today we address whether a Court can revoke probation for failure to pay a fine and restitution when there is

no evidence that the petitioner was at fault in his failure to pay or that alternate means of punishment were inadequate", footnote seven at 2069 (emphasis added).

Clearly, from the outset, Justice O'Connor's saw the probationer's fault as being a material concern in deciding whether a trial court erred in failing to expressly consider alternatives to incarceration. In deciding that the sentencing judge in Bearden should have considered alternatives to incarceration, Justice O'Connor noted in another footnote: "In contrast to a condition like chronic drunken driving, however, the condition at issue here, indigency, is itself no threat to the safety or the welfare of society". Footnote 9 at 2070. In contrast to the violation in Bearden, the violation by Mr. Romano, hit and run

driving, is a clear threat to the safety and security of society. Thus, the state trial judge could have properly concluded that a convict who would run over a friend, and leave him injured, without stopping to help his victim himself, is not responsible enough for any sort of probation, especially when the convict offers no justification for his actions.

In Bearden, Justices Powell, Burger and Rehnquist joined in a concurring opinion by Justice White. As to the Court's requirement that a trial judge may imprison certain probationers only if alternative measures are deemed inadequate, Justice White stated: "There is no support, in our cases or in my view, the Constitution, for his novel requirement". (Emphasis added). The Eighth Circuit obviously would disagree with the Justices. In its opinion, the

Eighth Circuit cited Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) and Morrisey v. Brewer, 408 U.S. 471 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), arguing that these cases required a sentencing judge to expressly consider alternatives to incarceration before revoking probation and ordering incarceration. Reading these cases in a light most favorable to the Eighth Circuit, petitioner is unable to find how these cases can be used to support the Eighth Circuit's holding. Morrisey due process requirements for parole revocation, as noted in footnote 1 on page 322 of the Eight Circuit's Opinion, says absolutely nothing about the consideration of alternatives to incarceration as a necessary element of due process. In Gagnon this Court did no more than apply the requirements of

Morrisey to probation revocations and added that "These requirements in themselves serves as substantial protection against ill considered revocation." Clearly, Justice White was correct when he concluded that "There is no support in our cases . . . for this novel requirement." Bearden, supra.

Review on certiorari is also warranted in that the District Court below and the Eighth Circuit Court of Appeals unfairly assumed that the state sentencing judge committed error and ignored the fact that the record did not show that the state sentencing judge's decision was clearly erroneous. As noted by the Eight Circuit, "The revocation of probation for violation of a condition of probation is within the discretion of the sentencing judge. United States v. Rifen, 634 F.2d 1142, 1144 (8th Cir.

1980)." Romano at 321. The scope of review is narrower when federal courts review state proceedings for their validity under the United States Constitution. Fritchie v. McCarthy, 666 F.2d 208 (9th Cir. 1980); Borordine v. Douzanis, 592 F.2d 1202 (1st Cir. 1979). This is because federal courts do not have supervisory power over state courts. United States, ex rel Gentry v. Circuit Court of Cook County, Municipal Division, First Municipal District, 586 F.2d 1142 (7th Cir. 1978); Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979), cert denied, 444 U.S. 936, 100 S.Ct. 286, 62 L.Ed.2d 196. A federal court must not overrule a state court's decision merely because it finds that the decision is not supported by the record. Maggio v. Fulford, 103 S.Ct. 2261, 1093. Thus, federal courts are required to afford

state court findings a "presumption of correctness", Bruce v. Duckworth, 659 F.2d. 776 (7th Cir. 1981), cert denied, 455 U.S. 955, 102 S.Ct. 464, 71 L.Ed.2d 673.

This "presumption of correctness" was recognized by the 8th Circuit when reviewing a probation revocation by one of its own federal courts. In United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978), the Eighth Circuit considered the appeal of a felon whose probation was revoked when the felon failed to comply with a probation condition requiring him to take vocational training. Petitioner Burkhalter argued that the district court abused its discretion when it failed to consider alternatives to incarceration. The Eighth Circuit speculated that petitioner's behavior indicated his ability to accept responsibility and

added "the District Court presumably considered these facts in determining whether appellant's chances of becoming a useful citizen would be better served if he successfully completes a probationary program or if he is imprisoned." Id. at 607. The Court then found no abuse of discretion.

It is often said that "what's good for the goose is good for the gander". While this is certainly no legal maxim, it only makes constitutional sense that our United States Courts of Appeals and District Courts should not be allowed to hold state courts to a higher and stricter standard than that applied to federal district courts when it comes to revocation of probation. Yet the District Court in the present case did just that when it stated:

"Judge Whipple indicated to Romano that once it was determined that he had violated a condition of his probation, he would terminate Romano's probation and send him to jail. The Court recognized that admonitions are commonly used by sentencing judges to inject fear of resulting consequences and discourage probation violations. But, when such statements are coupled with a record totally devoid of evidence showing that the judge considered alternatives to incarceration, there prevails a strong inference that the Judge harbored a disposition

> to send Romano to jail for any probation violation, regardless of the nature of the violation and without regard to any other possible options."

Romano, 735 F.2d at 323 quoting the District Court in Romano, 567 F.Supp at 886. Obviously from a silent record the District Court made its own presumptions as to the judges intent and motivation and presumed that the judge harbored an unconstitutional disposition toward Romano. To compound the judicial impropriety the Eight Circuit quoted this passage with approval, even though the District Court clearly presumed the State Court committed error when the State Court was entitled instead to a presumption of correctness. Likewise, without having the opportunity to observe

the demeanor of Romano during his hearing or without requiring an evidentiary hearing to take the state judge's testimony, the Eighth Circuit presumed that Romano's actions were not an attempt to avoid responsibility. Id. at 323. Considering the seriousness of Romano's violation and the fact that it occurred so soon after he was granted probation, if any presumption was to be made, it should have been one presuming the state judge considered whatever arguments for alternatives to incarceration that were presented by Mr. Romano's two attorneys, or by Mr. Romano himself, and concluded that a person who would run over someone and not stop to help them, was simply too irresponsible to be continued on probation.

In light of the fact that no prior Supreme Court ruling requires that

alternatives to incarceration be expressly considered in all probation revocation hearings, and in light of the fact that it is unclear as to whether the state judge did in fact consider alternatives to incarceration, the remedy granted by the District Court and affirmed by the Eighth Circuit can only be viewed as drastic and punitive against the State of Missouri.

There can be no question but that the appropriate remedy for denial of due process protections in parole and probation revocation hearings is to grant a new hearing. Atkins v. Marshall, 533 F.Supp. 324 (D.C.Ohio 1982). In Ford v. Wainwright,, 439 F.2d 981, cert. denied. 434 U.S. 926, 98 S.Ct. 407, 54 L.Ed.2d 284 (5th Cir. 1977), the state had revoked a prisoner's parole without any kind of hearing. The district court

ordered the state to provide a hearing for the prisoner who had been reincarcerated. The prisoner appealed, alleging that he was entitled to release; thus, the only issue on appeal, was the question of the appropriate remedy for a denial of procedural due process in a parole revocation hearing. The court held that a rehearing is the only appropriate remedy unless it has been shown that there was an unconstitutional delay in holding the revocation hearing. Id. at 983. While Ford and Atkins deal with parole revocations, they are persuasively applicable in a case involving the revocation of probation. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

There is an obvious reason why ordering a rehearing is the only appropriate remedy: to give a state the

opportunity to conduct a proper hearing. Gagnon, supra; Wynn v. Page, 390 F.2d 545 (5th Cir. 1968); Redding v. Vermillion, 416 F.Supp. 1181 (D.C.Mo. 1976). Even the Eighth Circuit has previously held that a state's right to hold a revocation hearing should not be taken away in the absence of a showing of demonstrated prejudice severe enough to render the revocation hearing itself inadequate in terms of relief. Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975). Thus, in Gagnon, the Supreme Court held that the state should be ordered to hold a rehearing even though the prisoner had served three years after revocation and was paroled before his habeas corpus petition was decided, facts extremely similar to the present case. Assuming a due process violation, the proper decision in the present case, therefore,

should have been one remanding the case to the state court, with instructions to hold a hearing wherein alternatives to incarceration are considered, with a reasonable amount of time for compliance, and in so doing, the court would have avoided substituting its own discretion for that of the judge hearing the probation revocation. Billiteri v. United States Board of Parole, 541 F.2d 938 (2nd Cir. 1976). Neither the district court nor the Eight Circuit discussed any alternatives to incarceration that should have been made available to Romano. Therefore, it cannot be said that Romano has suffered at all unless a hearing determines that there were in fact alternatives to incarceration that should have been considered for Mr. Romano. Only when there has been a determination that Mr.

Romano should have been given an alternative to incarceration can it be alleged that Mr. Romano has been in any way prejudiced. Until such a hearing, any allegation of prejudice is patently speculative.

The district court in the present case, and the Eighth Circuit in its opinion, make much of the fact that Romano had already served five and one-half years of his twenty-year sentence and could serve more if he again violated his parole. However, the amount of time Romano spent in prison does not justify the district court's action, and an affirmance of it. As noted earlier, in Gagnon, a Supreme Court case, the prisoner had in fact served several years after his parole was improperly revoked. Moreover, in Bumgarner v. Lockhart, 361 F.Supp. 829 (D.C. Ark. 1973), a hearing

was ordered to determine if a prisoner was competent to stand trial, since such a hearing had not been held before the prisoner's trial, even though he had served two and one-half years jail time after conviction. In United States ex rel. Rivers v. Faranzen, 522 F.Supp. 443 (D.C.Mo. 1981), the prisoner had served eight and one-half years. While appellants could offer more examples, the clear import of Gaynon, Bumgarner, Rivers and a number of other cases that could be named, it that the mere fact that a prisoner has served some time in prison is not a sufficient reason to release a prisoner outright until the state has had an opportunity to correct any due process deficiency. Appellants Black and Moore suggest that it is the province of the state and the state alone to decide when a prisoner has served enough time, unless

a sentence is shown to be constitutionally excessive. Even if one were to accept that the amount of time Romano spent in prison should be considered, Romano was the one who waited over four years before seeking a state or federal habeas corpus challenging the probation revocation. The State of Missouri should not be made to suffer the prejudice of Romano's outright release when that release is based on a delay caused solely by Romano. McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982). Moreover, the state has a right to observe convicted felons on a conditional release basis before giving them total freedom, unless that felon's conviction was constitutionally defective. Since Romano was not subject to the temptations and opportunities that face law-abiding citizens in society while he was in

prison, the court below has effectively ordered the State of Missouri to release a felon when the state cannot assure its citizens that that felon has been sufficiently rehabilitated so as not to constitute a risk to society.

Clearly, "a release from confinement . . . is an extraordinary remedy that deserves further discussion." Green v. Nelson, 442 F.Supp. 1047 (D.C.Conn. 1977). While it is true that in Green the prisoner was released, this was because the United States Parole Commission had engaged in numerous acts violating the constitutional rights of prisoners and had ignored court rulings against the Board. The court in Green decided, after fully considering the ramifications of release, that firm measures were required to ensure that the Commission acted constitutionally. Id.

at 1060. The present case in no manner presents a situation where there is a need to release Romano in order to punish the State of Missouri for repeated violations. The district court and Court of Appeals below suggest that there is some prejudice to Romano if he is subjected to the possibility of reincarceration. The Eleventh Circuit Court of Appeals made an excellent response to this issue in United States ex rel Graham v. United States Parole Commission, 732 F.2d 849 (11th Cir. 1984). In Graham an inmate had sought a writ of habeas corpus challenging certain parole regulations. Before his request was decided, he was released on parole. He appealed the dismissal of his case as moot on the grounds that, should he violate his parole, he would be reincarcerated and again subject to the

"unconstitutional" parole regulations. The Court responded "We believe this potential controversy is too speculative for adjudication". Id. at 850 (emphasis added).

The Eighth Circuit cited Iasigi v. Van de Carr, 166 U.S. 391, an 1897 Supreme Court case, as one the state should see to support the Court's ruling that Romano's release was not an abuse of discretion. Iasigi does not even marginally support the drastic actions taken by the district court in the present case. Joseph Iasigi was arrested in the City of New York on charges of embezzlement arising in the State of Massachusetts. Iasigi filed a habeas corpus petition alleging that he could not be sent to Massachusetts because, at that time, he was the duly recognized Counsel General of the Sultan of Turkey.

The district court denied the writ and remanded Iasigi to state custody. On appeal, the Supreme Court found that at the time Iasigi was remanded to state custody, he was no longer the Turkish Sultan's Counsel General, and thus the remand was affirmed. Clearly, not only does Iasigi not support a ruling that Missouri should be denied a chance to hold a new revocation hearing for Romano, but it is so totally unrelated to the issues before this Court, that its citation suggests plain error, requiring a reversal. The only portion of the entire opinion even marginally related to the present case is a portion quoting Justice Gray in Nishimura Ekiu v. United States, 142 U.S. 651, where the judge said:

> "A writ of habeas corpus is not like an action to recover

> damages for unlawful arrest or commitment, but its object is to ascertain whether the prison can legally be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

Iasigi, supra at 393. This quotation supports petitioners Black and Moore's contention that a mere defect in a revocation hearing, committing Romano to prison, does not justify his discharge from custody by a federal court. Therefore, an error has occurred in that the Eighth Circuit did not properly consider the issue of whether, under these facts, the district court abused

its discretion in completely releasing a convicted felon validly sentenced to twenty-years in prison without first giving the State of Missouri an opportunity to provide Romano with a hearing in accordance with the court's ruling. The law on this issue was clearly overlooked and misapplied, justifying a reversal.

In light of the extreme nature of the remedy granted, certiorari should also be granted in that the Eighth Circuit overlooked Appellants Black and Moore's arguments, and supporting cases, that the district court abused its discretion in denying these petitioners an evidentiary hearing to ascertain whether the state judge who revoked Romano's probation actually considered alternatives to incarceration. Judge Whipple could easily have concluded that

a convict who would run over a friend and leave him injured, without stopping to help his victim himself, is not responsible enough for any sort of probation, especially when that convict offers no justification for his actions. Before releasing a convict outright, the federal courts, out of respect to the states, should, in the very least, assure themselves that a deliberate denial of due process occurred, and not give such a drastic remedy based on a speculative finding of fact. Thus, a writ of certiorari should also be granted because the Eighth Circuit overlooked the issue of whether the district court should have held an evidentiary hearing to determine if the state judge had considered alternatives to incarcerating Romano before sending him to prison.

CONCLUSION

Petitioner's have shown that Supreme Court review is necessary in this case in that the decision of the Eight Circuit Court of Appeals is substantially in conflict with a prior decision of this Court and guidance must be given to the Eighth Judicial Circuit as well as all federal courts as to what the extent of due process must be in state probation revocation proceedings, and what remedy or remedies are most appropriate in such cases. Petitioner has established that a consideration of alternatives to revocation are not mandatory when a probationer knowingly and wilfully commits a serious violation of probation conditions. Moreover, absent extremely prejudicial circumstances caused by the clear misconduct of a state court or other state officials, the drastic remedy

of total release is not warranted and a state should only be ordered to grant a new revocation hearing. Petitioner calls upon this court to review this important case by granting this petition for a writ of certiorari.

Respectfully submitted,

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